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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 495

JOHN T. DALY, *Petitioner*

v.

JOSEPH F. FINNEGAN, Director, Federal Mediation and Conciliation Service, L. E. EADY, Director of Administrative Management, Federal Mediation and Conciliation Service, PHILIP YOUNG, Chairman, United States Civil Service Commission, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
The Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	11
1. Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title U.S.C.A., and were the substantial rights of Petitioner, a Veteran, affected when his removal from his position as a Commissioner in the Federal Mediation and Conciliation Service was accomplished upon some serious charges which were based solely upon the divulgence, without his consent, of such intercepted communication?	11
2. Whether the Petitioner was denied due process of law:	
(a) When his guilt was prejudged in the charges of September 10, 1952, without affording him the right to be heard which he had under Section 14 of the Veterans Preference Act of 1944 as amended	14
(b) When the Chief Law Officer in his decision enlarged or added new charges to the charges of September 10, 1952, and his decision was otherwise so erroneous that it should be vacated	14
3. Whether under the circumstances of the case Petitioner, being entitled to a Hearing, was denied due	

Page

process of law and this Court should reconsider its decision in *Bailey* v. *Richardson*, 341 U. S. 918, which was rendered by an equally divided Court and modify or overrule the principle stated therein 18

4. Whether the Civil Service Commission complied with the procedural requirements of Section 14 of the Veterans Preference Act of 1944 as amended when its decision which removed the Petitioner from his position failed to give him therein the reasons therefor in writing, and as required under the decisions of the Court below 19

5. Whether the charges lacked the specificity and detail as required by Section 14 of the Veterans Preference Act of 1944 as amended and under the decisions of the Court below 20

Conclusion 23

INDEX TO APPENDIX

Ruling of the United States District Court for the District of Columbia ..... R. 50-53
Order of the United States District Court for the District of Columbia ..... R. 58-59
Decision of the United States Court of Appeals for the District of Columbia Circuit ..... App. 1a-4a
Constitutional Provisions and Statutes Involved 5a

TABLE OF CASES CITED

Bailey v. *Richardson*, 86 U.S. App. D.C. 248, 182 F. 2d 46, affirmed 341 U.S. 918 18
Blackmar v. *United States*, 130 C.Cls. 812 ..... 19, 20
Bridges v. *Wixon*, 326 U.S. 135 17
Deak v. *Pace*, 88 U.S. App. D.C. 50, 185 F.2d 997 22
Elchibegoff v. *United States*, 106 C.Cls. 541 15
Goldstein v. *United States*, 316 U.S. 114 13

Page

Joint Anti Fascist Committee v. *McGrath*, 341 U.S. 123 17
Kessler v. *Strecker*, 307 U.S. 22 17
Kotteakos v. *United States*, 328 U.S. 750 ..... 13, 22
Kutcher v. *Higley*, 98 U.S. App. D.C. 278, 235 F. 2d 505 19, 20
Manning v. *Stevens*, 93 U.S. App. D.C. 225, 208 F.2d 827 22
Money v. *Anderson*, 93 U.S. App. D.C. 130, 208 F.2d 34 22
Mulligan v. *Andrews*, 93 U.S. App. D.C. 375, 211 F.2d 28 19, 20
Murray's Lessee v. *Hoboken Land Imp. Co.*, 18 How. 272 17
Nardone v. *United States*, 302 U.S. 379 12
Nardone v. *United States*, 308 U.S. 338 9
Olmstead v. *United States*, 277 U.S. 438 ..... 13, 22
On Lee v. *United States*, 343 U.S. 747 13
Reitmeister v. *Reitmeister*, CCA 2, 162 F.2d 691 12
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 13
Trustees of Dartmouth College v. *Woodward*, 4 Wheat. 518 (Webster's Argument) 17
United States v. *Goldstein*, CCA 2, 120 F.2d 485 13

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution—Fifth Amendment 5a
The Communication Act of June 19, 1934, 48 Stat. 1103, 47 U.S.C.A. § 605 ..... 8, 5a
Section 14 of the Veterans Preference Act of June 27, 1944, as amended, 63 Stat. 1067, 5 U.S.C.A. 863 ... 19, 5a

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Your Petitioner, John T. Daly, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 27, 1957.

OPINIONS BELOW

The Ruling of the United States District Court for the District of Columbia appears at pages 50-53 of the Record and its Order at pages 58-59 of the Record. The Opinion of the Court below (Appendix A, *infra*, pp. 1a-4a) has not yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

This Court granted certiorari on January 14, 1957 in the case of *Rathbun* v. *United States,* No. 30, October Term, 1957, in which it was limited by this Court to a question, the first part of which, dealing only with interception, is identical to the question presented in the instant case.

(1) Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47, U.S.C.A. * * *

If this Court should answer the above question in the affirmative in the *Rathbun* case, *supra,* the Petitioner respectfully presents the remaining part of his Question Presented as follows, it arising in a civil proceeding:

and were the substantial rights of Petitioner, a Veteran, affected when his removal from his position as a Commissioner in the Federal Mediation and Conciliation Service was accomplished upon some serious charges which were based solely upon the divulgence, without his consent, of such intercepted communication.

(2) Whether the Petitioner was denied due process of law:

(a) When his guilt was prejudged in the charges of September 10, 1952, without affording him the right to be heard which he had under Section 14 of the Veterans Preference Act of 1944 as amended.

(b) When the Chief Law Officer in his decision enlarged or added new charges to the charges of September 10, 1952, and his decision was otherwise so erroneous that it should be vacated.

(3) Whether under the circumstances of the case Petitioner, being entitled to a Hearing, was denied due process of law and this Court should reconsider its decision in *Bailey* v. *Richardson*, 341 U. S. 918, which was rendered by an equally divided Court and modify or overrule the principle stated therein.

(4) Whether the Civil Service Commission complied with the procedural requirements of Section 14 of the Veterans Preference Act of 1944 as amended when its decision which removed Petitioner from his position failed to give him therein the reasons therefor in writing, and as required under the decisions of the Court below.

(5) Whether the charges lacked the specificity and detail as required by Section 14 of the Veterans Preference Act of 1944 as amended and under the precedents of the Court below.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent constitutional provision and statutes involved in this case are set forth in Appendix B *infra*. (p. 5a)

STATEMENT OF THE CASE

Petitioner is a Veteran of World War I. He was appointed a Commissioner in the Federal Mediation and Conciliation Service, hereinafter referred to as the Agency, on September 15, 1938. He had about four years prior service in the Government of the District of Columbia; making a total period of service of about 18 years for retirement purposes. He served continuously and satisfactorily in said Agency. He had served as a Regional Director in Philadelphia, Pa., from March, 1948, to January 1st, 1952 on which later date he voluntarily returned to his former position as a Commissioner. This was not a demotion. (R44) He was succeeded in said position of Regional Director by one Paul S. Holbrook, whose tragic role in this proceeding will be hereinafter

described in detail. During his service with the Agency he received many excellent efficiency ratings. (R32) His last efficiency rating, prior to the date of the charges on September 10, 1952, was satisfactory. (R22) In the charges of September 10, 1952, he was summarily relieved of all of his duties effective on the same day. (R11) Said Holbrook was serving as Petitioner's superior when the aforesaid charges were served upon him.

The Agency first made an adverse decision on September 29, 1952, separating Petitioner on October 10, 1952. (27) Then on October 10, 1952, the Agency extended "the proposed date of separation" to November 14, 1952. (28) However, on October 25, 1952, (R12-13) Petitioner, ill and under the care of Dr. E. Stuart Lyddane, made a written appeal to the Agency to review its adverse action and, when released by his physician, restore him to duty, citing the long and serious illness of his mother and of her passing away. Also, of the illness of Mrs. Daly's mother, Mrs. Barnette, who resided but a half block from their home and of her passing away. These were the main reasons his wife was not with him in his assignments out of Washington. Petitioner confessed his efficiency had been impaired. (R12-13) The decision of the Chief Law Officer of the CSC recites out of context only this admission. (42) But what did the Agency do? It treated the Petitioner's appeal, as above described in his letter of October 25, 1952, as his "answers and evidence you have submitted in reply to the charges * * *", and this the Agency delayed doing until on November 14, 1952 (R14) which was the very day on which Petitioner's removal was to become effective as had been long previously fixed by the Agency. (R28) In other words, the Agency waited 19 days to answer Petitioner's letter of October 25, 1952. It would serve no useful purpose for the Petitioner to deny the charges after the Agency had acted adversely thereon and in such an incredible fashion.

The adverse decision of the Agency dated November 14, 1952 (R14) merely held that Petitioner's retention was "not warrant[ed]." The decision of the Chief Law Officer (R47-48) held "that no change be made in the personnel action" taken by the Agency as above described. The decision of "The Commissioners" of the CSC (18-19) by Corrected Copy dated March 31st, 1954, (R19), held that Petitioner's removal "was warranted". All three adverse decisions failed to comply with Section 14 of the Veterans Preference Act of 1944 as amended which required that the adverse decision upon which Petitioner "shall be discharged" shall be "for such cause as will promote the efficiency of the service *and for reasons given in writing.*" (Italics supplied) The same proviso in italics appears in the Lloyd-LaFollette Act of August 24, 1912, c. 389 § 6, 37 Stat. 555, 5 U. S. C. 652.

Petitioner requested a Rehearing before the CSC on March 31, 1954. (R19-20) It was denied 2 days later on April 2, 1954, (R20-21) though the CSC had held Petitioner's appeal for about 11 months.

District Court denied the motions for summary judgment filed by the respective parties but remanded the case to the CSC for a new hearing excluding therefrom any evidence relating to the wiretap incident of April 3, 1952 and providing "that the testimony of Paul S. Holbrook may properly be received." (58-59), though the Ruling by the Court provided for more extensive relief. (R50-53) It is apparent that the only purpose of providing in defendant's below second order (R55) for the taking of the Holbrook testimony was to substitute it for the unlawful wiretap evidence as represented by the Barrett affidavit, (R29-31), it being the only evidence of the conversation between Petitioner and Holbrook in these proceedings. Appellants appealed. Appellee filed a motion to dismiss on the ground the Order was not a final one. It was denied without prejudice to a renewal at the argument on the merits. Appellee preserved it at the

Hearing. The judgment of District Court was reversed with instructions to the District Court to grant defendant's motion for summary judgment. Appellee's motion to dismiss was denied. (App. 4a)

The Demotion of June 2nd, 1952

Petitioner was demoted on June 2, 1952, solely upon a series of alleged offenses dated April 3rd, 1952. Petitioner was not given the reasons for his demotion (R33), and, accordingly, it was an invalid demotion for it failed to comply with the procedural requirements of Section 14. (R45) But the alleged offenses occurring on April 3rd, 1952, which were the sole basis for the demotion were used again and later became Charge 1, Specifications (a), (b), (c) and (d) of the Charges to dismiss Petitioner dated September 10, 1952. (R6, par 13, R43, R45) However, three of the four above specifications were based upon wiretap evidence as will be shown hereinafter. Plainly, if Petitioner had been given the reasons for his demotion, in affording him an opportunity to defend himself, whether he had been successful or not, these wiretap charges would not have come to light again and they, therefore, could not have been made a part of the charges to dismiss him on September 10, 1952. The unlawful demotion was highly prejudicial to Petitioner in his defense to the said Charges to dismiss him.

These same alleged offenses occurring on April 3rd, 1952 were also the sole basis for Petitioner being placed on probation on June 3, 1952. (R35) It is noteworthy to observe that this probation referred specifically to Petitioner's transfer to New York, (R11) from Philadelphia where the incidents of April 3rd, 1952 took place. But this period of probation of 12 months was, like the demotion, invalid, as there is no known authority for placing a Veteran on probation for such an extended period of time. Also the probation, like the demotion, became part of the charges of September 10, 1952 upon

which Petitioner was separated. (R11) Here it is demonstrated that Petitioner was punished by three separate disciplinary actions for the same offenses of April 3, 1952 upon which three of the four specifications it will be shown were based upon wiretap evidence. Two Hearing Officers, the Chief Law Officer and the three Civil Service Commissioners failed and neglected to correct this shameful procedure. (R39-48, "The Commissioners, being the last three lines at R18, to include Corrected Copy (March 31, 1954) (R19).

The Court below erroneously stated (App. 3a) that the decision of the Chief Law Officer was affirmed by the Board of Appeals and Review. There was no decision by the Board of Appeals and Review.

The Charges of September 10, 1952

Charge 1, Specifications (a), (b), (c) and (d) relate to Petitioners alleged offenses on April 3, 1952. (R9-10) Holbrook was the complaining witness in all of them. Petitioner claims that Specifications (b), (c) and (d) were based solely upon wiretap evidence. District Court found that "two of the charges are completely predicated upon that telephone conversation." (R51) The Court below found that the wiretap evidence "bore upon only one of the four specifications". (App. 3a) (Note: All other charges are hereinafter presented for the purpose of showing lack of specificity as required in Section 14.)

At 3:15 PM on the afternoon of April 3, 1952, being (c) above, Petitioner, as sender of a telephone conversation, telephoned his superior, Holbrook, who buzzed the office of Miss Barrett, his Secretary, once, which served as a signal for her to use the extension telephone in her office to record a telephone conversation. At the signal, she picked up the receiver and started taking notes. The conversation was between Petitioner and Holbrook. From her stenographic notes she prepared a Memorandum for

the Record bearing the same date. From this Memorandum for the Record she made an affidavit dated January 23, 1953, and this she did at the request of one Rene Callec[illegible]n Investigator of the Civil Service Commission (R29-31) who either filed it or caused it to be filed in Petitioners record in the Commission about a week before the Hearing on March 6, 1953. (R32) The Court below erroneously stated (App. 3a) that it was the aforesaid Memorandum which was illegally admitted whereas it was the above affidavit made by Miss Barrett. Miss Barrett's affidavit could scarcely have been filed before it was sworn to on January 23, 1953, which was 70 days after Petitioner was removed on November 14, 1952 and more than 4 months after the charges of September 10, 1952. But this wiretap evidence was not discovered until on or about April 7, 1954, (R32-34) which was after the final decision, March 5, 1954, upon which Petitioner was removed. However, such interception and divulgence were in violation of Section 605 of the Communications Act of 1934, 47 U. S. C. 605. Petitioner, as sender of the telephone conversation, neither authorized its interception nor consented to its divulgence. Though Holbrook directed Miss Barrett to intercept and record the telephone conversation, there is not a whit of evidence that he gave her, as receiver of the telephone call, his permission for her to divulge it. This shameful act was directed against a fellow-employee in the same office and a Veteran of World War I.

Charge 1(c): Petitioner was accused and convicted of falsely informing Holbrook in *3:15 P.M.* telephone conversation that he was "meeting with representative Mullin of the *A & P Stores.*" The Barrett affidavit, Paragraphs 4 & 5, (R30), allegedly proved that Petitioner lied when he so informed Holbrook. (Note: Clearly, this wiretap evidence proved 1(c).) But this wiretap conversation between Petitioner and Holbrook *also* was devoted to what, if anything, Petitioner had done as to

Food Fair, which was the earlier Charge 1(b) wherein Petitioner was accused and convicted of falsely informing Holbrook at 1:30 PM that he was "meeting with • • • Food Fair situation." Here the Barrett affidavit shows Holbrook inquiring of Petitioner, "if he had *done anything* on the *Food Fair* situation, whereupon Petitioner informed him "that he *hadn't done anything* except check with Jules Schwartz." (30) Now if Petitioner "hadn't done anything except check with Jules Schwartz" *by 3:15 PM,* it is alleged proof that he could not have been in a meeting with *Food Fair* earlier at 1:30 PM. (Italics supplied) However, there is more evidence in the Barrett affidavit to prove Charge 1(b). As shown by the Barrett affidavit, Mr. Shapiro was attorney for Food Fair. In the Barrett affidavit, being the last two lines at (R30), to the end of that paragraph on the next page, we find Holbrook demanding that Petitioner call Mr. Shapiro, while Petitioner is insisting there would be no strike, stated: "All right, we'll set up a meeting." Plainly, there would be no point in setting up a meeting if there had previously been a meeting at 1:30 PM, so it was proof there was no meeting at 1:30 PM and thus proof of Charge 1(b). (Clearly, this wiretap evidence proved 1(b).).

Charge 1(d) is not, as the Court found below (App. 3a), "a call at 5:30 PM", it was a meeting between Petitioner and Holbrook wherein Petitioner was accused of having "compounded [his] falsification by alleging that you informed him only that you were "in contact" with the parties." The only proof of any falsification is the Barrett affidavit, so that which provided the "compounding" of the falsification was based upon a "lead" from wiretap evidence and as such was "a fruit of the poisonous tree." *Nardone* v. *United States,* 308 U. S. 338. (Clearly, this wiretap evidence proved 1(d)). The Court below found (App. 3a) that "the telephone call at 3:15 on April 3, 1952, *bore upon only one* of the four specifi-

cations." As above shown, the Barrett affidavit "bore upon" both A & P Stores as well as Food Fair. It also bore upon 1(d).

On the other hand, Holbrook's own affidavit (R23) proved that Petitioner was "in contact" with Mr. Poole's office "that morning", and had a telephone conversation with Mr. Schwartz of Food Fair "that afternoon". Thus, Petitioner was, in fact, telling the truth, when he told Holbrook he was in contact with the parties. Petitioner's affidavit (R15) dated December 24, 1952 confirmed it before he could have possibly known that Holbrook himself would confirm it by his own affidavit (R23) dated January 23, 1953. (R23-24 fixes the date.) Many persons in the administrative levels had to see this wiretap evidence and this incident relating to the charge "no contact" in 1(d), and all remained silent. Petitioner denied all of the charges in his affidavit (R15-17) dated December 24, 1952, except Charge 3(b), which related to his being late at work on August 25, 1952.

At the end of the charges, (R11) the Agency informed Petitioner that "it has been determined that you can no longer satisfactorily perform the duties of a Commissioner and should be separated from the Service. In order to effectuate this "determination" and bent upon doing it speedily, the Agency then relieved him of his duties on the same date as the charges, without awaiting for Petitioner's answer to the charges which he was entitled to make under Section 14.

REASONS FOR GRANTING THE WRIT

I

Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47 U. S. C. A., and were the substantial rights of Petitioner, a Veteran, affected when his removal from his position as a Commissioner in the Federal Mediation and Conciliation Service was accomplished upon some serious charges which were based solely upon the divulgence, without his consent, of such intercepted communication?

The Court below in reference to the charges based upon wiretap evidence states that the "first point on the appeal concerns the admissibility of disputed evidence."* The Court further stated that the "Secretary's Memorandum was illegally admitted to the record at the Commission." It is true that a record of the wiretap evidence was so admitted, but it was the Barrett affidavit which recited the intercepted telephone conversation and it was the only evidence before the Courts below and here on the three charges (b), (c) and (d) of Charge 1. It is interesting to note that the Chief Law Officer's decision makes no reference to any one of the 4 Specifications in Charge 1. The Court below found that the wiretap evidence "bore upon only one of the four specifications" in Charge 1. (App. 3a) We have shown in our Statement of the Case that 3 of these charges were based upon the intercepted telephone conversation at 3:15 PM wherein Petitioner and Holbrook discussed the activity of the former in *both* the Food Fair and the A & P Stores situation. The Court below further concluded that it did not reach the question "whether the evidence was or was not properly considered." (App. 4a) It also passed all other questions pre-

* Appellants below stated its question presented No. 1 as follows: "Whether a Secretary who listened to a telephone conversation on an extension and transcribed it, under the instructions of a party to the conversation, has 'intercepted' a communication in violation of Section 605 of the Communications Act."

sented except that the invalidity of one of the charges will not vitiate a removal where the remaining charges are valid and sufficient, which ruling is in error here.

As far as can be determined, there is no precedent on or approaching the consideration of and a decision based upon wiretap evidence on an issue of a civil character in a quasi-judicial proceeding, of which there are so many in the Executive Branch of the Government. However, Petitioner told the Court below in oral argument that there is pending in our local District Court the case of another removal, like the instant case, upon wiretap evidence. (*Sheehan* v. *Wilson*, Civil Action No. 3590-53)

The only precedent in our Federal Courts dealing with a civil action based upon a violation of Section 605 arose in the case of *Reitmeister* v. *Reitmeister*, C. C. A. 2, 162 F. 2d 691, 694. There a civil action was instituted for damages arising out of an interception and later divulgence in a Probate Court of conversations between two brothers. The conversations were recorded on a mechanical devise which would automatically take down what came out of a telephone receiver. Judge Learned Hand found such a recording an interception and its publication unlawful. Judge Hand said:

> "Although the act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a crminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."

It would seem peculiarly appropriate here to show that while the case of *Nardone* v. *United States*, 302 U. S. 379, was directed at federal officers in the detection of crime resorting "to methods deemed inconsistent with ethical standards and destructive of personal liberty," Mr. Justice Roberts included (p. 384) "as well as others." But

this Court has said that only this Petitioner is to be protected. Judge Learned Hand was also the author of the opinion in *United States* v. *Goldstein*, 120 F. 2d 485, 490, which was affirmed by this Court in 316 U. S. 114, where this Court said, (p. 121) in speaking of the view of Judge Hand, "The Court further thought that, as the sender might make such divulgence lawful by his consent, none but he was intended to be protected against divulgence. Again we agree." While a question of search and seizure under the Fourth Amendment was before this Court in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 395, Mr. Justice Holmes, in speaking of a statute forbidding the acquisition of evidence, made it abundantly clear that the evidence so obtained shall not merely be used before the Court, "but that it shall not be used at all." In light of this admonition, it would appear to be inescapable that the Civil Service Commission would have to be included. If so, then the use and consideration of improper evidence, upon which Petitioner was removed from his position, would deny to him a fair and impartial Hearing. In *Kotteakos* v. *United States*, 328 U. S. 750, 762, 764-765, 775, in a cause where in terms no distinction was made between a criminal and civil statute, Mr. Justice Rutledge said: "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." This Court has repeatedly denounced the practice, which, in our humble view, would go to the issue of whether Petitioner received a fair and impartial Hearing. Mr. Justice Holmes in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, referred to the practice of wiretapping as "dirty business." Mr. Justice Frankfurter in his dissenting opinion in *On Lee* v. *United States*, 343 U. S. 747, 758, in speaking of wiretapping referred to the 'odious doctrine' as Mr. Justice Brandeis called it, "that the end justifies reprehensible means."

II

Whether the petitioner was denied due process of law:

(a) When his guilt was prejudged in the charges of September 10, 1952, without affording him the right to be heard which he had under Section 14 of the Veterans Preference Act of 1944 as amended.

(b) When the chief law officer in his decision enlarged or added new charges to the charges of September 10, 1952, and his decision was otherwise so erroneous that it should be vacated.

(a) The first paragraph of the charges of September 10, 1952 (R9) provided that Petitioner would be separated "effective thirty days after the date of receipt of this letter by you". The Agency then had determined the date of his discharge.

After the recitation of all of the Charges (R11), the Agency made it plain to Petitioner that it had determined he was to be removed and it did so in the following language:—

> "It is apparent that you have failed to comply with the terms applicable to your service during the probationary period and, therefore, it has been determined that you can no longer satisfactorily perform the duties of a Commissioner of Conciliation and should be separated from the service."

In order that such a "determination" to remove Petitioner may be put into effect as speedily as possible, the Agency made it effective contemporaneous with the date of charges, that is, September 10, 1952. In the next to the last paragraph (R11) the Agency continued:

> "Effective as of today, your official duty station is being changed from New York, New York, to Washington, D. C. where you will be attached to the office of the Associate Director of the Service for reporting purposes only."

It has been shown in Petitioner's Statement of the Case the highly unwarranted action taken by the Agency, through its respondent, L. E. Eady, Director of Administrative Management. It is unthinkable that he did or could have taken such action without the explicit knowledge and approval of the Director of the Agency. The basis he used for such action and the method followed is compelling proof that Petitioner's guilt had been prejudged. Eady well knew, due to his qualifications in the peculiar area in which he acted in matters involving personnel, that he had nothing in Petitioner's letter of October 25, 1952 upon which to base his action, and it was clearly reckless. Eady had to know about the wiretap incident but on that he saw fit to take no action whatsoever. In fact, as matters later developed, Eady removed Petitioner 70 days prior to the time the wiretap evidence was placed in Petitioner's file in the CSC by an employee of the CSC, so Petitioner could not have given any answer to that evidence before his removal on November 14, 1952.

The Chief Law Officer had to have Petitioner's letter to Eady dated October 25, 1952 for he inserted a paragraph of it out of context in his decision. With Eady's adverse decision of November 14, 1952, before him it was plain to the Chief Law Officer what Eady had done. The Chief Law Officer remained silent. The Commissioners merely affirmed the Chief Law Officer. The precise question herein was before the Court of Claims in *Elchibegoff* v. *United States*, 106 C. Cls. 541. The Agency had notified the plaintiff in three letters "that he was being separated". The CSC took the following view: (p. 553) "In other words, a decision had already been made to discharge him and the date of the discharge was determined". Chief Judge Jones said (p. 560) "To construe the three letters as a compliance with the law when each of them contains the statement that the matter had already been determined is almost to make a mockery

of the law". Petitioner was denied a fair and impartial hearing.

(b) Charge 2 of the charges (R10) refers to a conversation between Petitioner and the Associate Director on April 9, 1952 on the topic of Petitioner's alleged habit of intemperance.

It is the only conversation referred to in the charges on such a subject. However, since the decision of the Commissioners of the CSC merely affirmed the decision of the Chief Law Officer without an opinion, it is important to invite the attention of the Court to what the Chief Law Officer did in his decision.

(1) The Chief Law Officer enlarged or added new charges to the charges of September 10, 1952 when he stated in his decision that Petitioner's "*intemperance which affected his performance and reliability were discussed with him by officials on a number of occasions.*" (R47) (Italics supplied)

(2) At the end of the charges, it is stated that Petitioner was transferred from Philadelphia, Pa., to New York City, this being the only reference in the charges to a transfer. The Chief Law Officer enlarged or added new charges to the charges of September 10, 1952 when he stated in his decision that the Petitioner "*was transferred and reassigned on several occasions with a view of affording him an opportunity to improve his record.*" (R47) (Italics supplied) Both the "discussions" and the "transfers and reassignments" were entirely new charges. They were highly prejudicial. Like the wiretap charges, these too were ignored. The Chief Law Officer and the Commissioners were in the role of Hearing Officers. In these circumstances, Petitioner could not have been accorded a fair and impartial hearing.

The decision of the Chief Law Officer consists of 3 lines (R39) and continues to (R48) a total of 8 pages and 14 lines.

(1) From (R39), to the middle of (R46), a total of 6 pages and 15 lines, the Chief Law Officer deals only with the *demotion* of June 2, 1952, except at (R43) the paragraph beginning with "During the hearing on the appeal * * *" down to the end of that paragraph. In the first sentence of this paragraph, appears the only mention of Charge 1 in the entire decision. At (R43) in the same paragraph Charge 2 is mentioned only to correct the date it occurred. The alleged intoxication is again mentioned in the second paragraph at (R46) and *again* the correction of the date it occurred is made. Charge 3 is not mentioned in the decision.

(2) Charges 1, 2 and 3 are mentioned at (R46-47) only to place under the appropriate charge the names of the persons who made affidavits and names of persons who testified.

(3) At (R46) the decision devotes about 10 lines to the "Relative to the merits of the case * * *", then devotes 19 lines to the material described in the above (2). Lastly, adds the two new charges and tell us how the Agency "considered" Petitioner.

A plea is here made to the Court to vacate the decision of the Chief Law Officer, which would have the effect of rendering void the decision of the Commissioners dated March 5, 1954. (R18-19) Petitioner's removal upon such a decision was wholly lacking of any concept of fairness. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581 (Webster's Argument), *Murray's Lessee* v. *Hoboken Land Imp. Co.*, 18 How. 272, 280-281, *Kessler* v. *Strecker*, 307 U.S. 22, 34, *Bridges* v. *Wixon*, 326 U.S. 135, 154, *Joint Anti Fascist Committee* v. *McGrath*, 341 U.S. 123, 136, 168-170, 177.

III

Whether under the circumstances of the case Petitioner, being entitled to a Hearing, was denied due process of law and this Court should reconsider its decision in Bailey v. Richardson, 341 U. S. 918, which was rendered by an equally divided Court and modify or overrule the principle stated therein.

In *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, the Appellant was given a temporary appointment on March 25, 1948, and on the following May 28, 1948, she was reinstated but subject to the condition that her removal might be ordered by the Civil Service Commission if investigation of her qualifications, made within 18 months, disclosed disqualifications. She was removed under a proviso of the Executive Order 9835. The Court said that the "President, *absent congressional restriction*, may remove from Government service any person of whose loyalty he is not completely convinced", and that he may do so "without assigning any reason and without giving the employee any explanatory notice." (Italics supplied) But the Court also found (p. 259) that Miss Bailey was not entitled to a Hearing under the Lloyd-LaFollette Act. Further, the Court found (p. 259) as follows: "In terms the due process clause does not apply to the holding of a Government office." In the instant case, it is submitted that we have a "Congressional restriction", for Petitioner is entitled to a Hearing which he received as provided by the mandate of Congress in Section 14. It is respectfully urged that upon the whole record here Petitioner was denied a fair and impartial Hearing, and, therefore, the *Bailey* case, *supra*, in its broad and sweeping language, should be reversed.

IV

Whether the Civil Service Commission complied with the procedural requirements of Section 14 of the Veterans Preference Act of 1944 as amended when its decision which removed petitioner from his position failed to give him therein the reasons therefor in writing, and as required under the decisions of the Court below.

The pertinent provision of Section 14 of the Veterans Preference Act of 1944 provide (App. B, p. 5a):

> "No permanent * * * preference eligible, * * * shall be discharged * * * except for such cause as will promote the efficiency of the service *and for reasons given in writing* * * *." (Italics supplied)

In the administrative proceeding below, three adverse decisions were rendered and in none of them were the "reasons given" therein for the adverse decisions. (*Supra* p. 5) Section 14 of the Veterans Preference Act of 1944 as amended required that it be done. The same clause appears in the Lloyd-LaFollette Act of August 24, 1912, c 389, § 6, 37 Stat. 555, 5 U. S. C. 652.

The decisions of the Commissioners of the Civil Service Commission by its adverse decision dated March 5, 1954, by its Corrected Copy dated March 31st, 1954, merely held that Petitioner's removal "was warranted." (R. 18-19)

Plainly, upon this showing alone, Petitioner was entitled, as a matter of law, to reinstatement by the Court below. The clear unequivocal language of the decisions of the Court below and of the Court of Claims support this contention. *Mulligan* v. *Andrews*, 93 U. S. App. D. C. 375, 211 F. 2d 28, *Kutcher* v. *Higley*, 98 U. S. App. 278, 235, F. 2d 505 and *Blackmar* v. *United States*, 130 C. Cls. 812. In the *Mulligan* case, *supra*, the Court below in speaking of the decision which removed the Appellant said: "The key clause in that decision was 'the evidence is such as to show your unsuitability'." The Court

continued: "Plainly, and we so hold, the requirement of 'reasons' for removal is not satisfied by the conclusion of 'unsuitability' based upon vague references to Appellant's answer and 'facts developed during the investigation.' The decision failed to disclose which of the charges contained in the notice of proposed adverse action were relied upon for removal; or, whether removal rested upon any of the charges." The Court of Claims in the *Blackmar* case, *supra*, adopted the rationale of the *Mulligan* case, *supra*. The *Kutcher* and *Blackmar* cases, *supra*, both involved Veterans.

V

Whether the charges lacked the specificity and detail as required by Section 14 of the Veterans Preference Act of 1944 as amended and under the precedents of the court below.

It is submitted, with great deference to the Court below, that under its decisions on the lack of specificity in charges, the remaining charges 1(a), 2, and 3(a) and 3(c) should not have been permitted to stand. As to Charge 3(b) it is without sufficient substance to warrant a dismissal on it. If, on the other hand, and apart from the other questions presented, it is found that the Petitioner's substantial rights were not affected by his conviction upon the three wiretap charges, and he is not entitled to relief upon them alone, then, it is submitted, in the alternative, that each of the three wiretap charges are tainted and should not be permitted to stand.

Charge 1(a): Petitioner was accused and convicted of being unavailable "on the morning of April 3, 1952" when he was needed to service the Food Fair and A & P Stores which had been assigned to him. Holbrook's own affidavit (R23) proves that Petitioner called Mr. Poole on "that morning" so he was on the job. But the "Key" word in the charge is that Petitioner was then "needed", when the remaining charges even down to 5:30 PM fails to

show that labor and management were deadlocked for it is axiomatic, in the area of Petitioner's duties, that only when all negotiations failed would he step in to it. If there had been a strike or the inminence of one, a person would have to be quite naive to think that Holbrook would not have made the most of it. Holbrook determined to "tap" Petitioner's telephone call to him at 3:15 PM, but he was too busily engaged in a criminal activity to ask Petitioner where he was or had been "this morning".

Charge 2: Here Petitioner was accused and convicted of having a "habit of intemperance that has seriously interfered with your work perforcance," yet in this broad and sweeping charge only one instance of "apparently under the influence of intoxicants" is recited as is this one instance of interfering with his work. For this charge to conform to the well-recognized requirement of specificity, in order that Petitioner may be accorded a fair opportunity to defend himself, a series of drinking incidents with the dates and places thereof would have to be charged and proven and the same may be said with reference to his work. Only then could this Charge 2 be sustained. It was hopelessly vague. All Petitioner could do was to enter a general denial. After 14 years of continuous service, the Agency could come up with only one instance of drinking. (Note: This alleged drinking incident is stated in the charges as August 26, 1952 whereas it should have been August 22nd, 1952, the Agency missed it 4 days yet it was quite close to the date of the charges.) (R46)

Charge 3 (a): This one charges Petitioner with reporting late on August 18, 1952 which he had done on many prior occasions with the approval of the Regional Director, for he had not previously directed him to stop it. Then this is made a charge as of that date.

Charge 3 (b): On this one Petitioner expressed his regret for an unintentional violation. His affidavit (R16) discloses that he was required to work at night and over week-ends and that "the practice of reporting late to work was not new."

Charge 3 (c) was dismissed by District Court (R52) upon the ground that it failed to provide Petitioner the specificity and detail required of Section 14. This charge is hopelessly lacking in specificity, yet is it not incomprehensible that it went through all of the levels at the CSC without it being disturbed? *Deak* v. *Pace*, 88 U. S. App. D. C. 50, 185 F. 2d 997, *Money* v. *Anderson*, 93 U. S. App. D. C. 130, 208 F. 2d 34, *Manning* v. *Stevens*, 93 U. S. App. D. C. 225, 208 F. 2d 827. The Court below in the *Manning* case, *supra*, consistently referred only to the "charge" with the word quoted. Petitioner was, therefore, required to examine the file in the District Court, Civil Action No. 5166-51 to ascertain the nature of the charge. Appellant was there charged in Exhibit A attached to the Complaint with "during the period March-April, 1950, you participated with * * * in abnormal sexual practice or practices." The Court below found such a charge lacked specificity and reversed the judgment of the District Court. Judge Letts ordered Appellant reinstated on June 11th, 1954. The ruling is consistent with principle. We can find no better expression of it than that made by Mr. Justice Brandeis in his dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 484, where there this Court decided that the acquisition and use of wiretap evidence did not violate the Fourth Amendment. Mr. Justice Brandeis said: "The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw."

In the *Kotteakos* case, *supra*, this Court disagreed with the ruling that the permeating error did not affect the "substantial rights of the parties", and said: (p. 775) "That

right, in each instance, was the right not to be tried en masse (in italics) for the conglomeration of distinct and separate offenses committed by others as shown by this record." In the instant case, Petitioner's substantial rights were affected upon his being tried on some charges based solely upon evidence which Congress had outlawed by Section 605, the violation of which Congress also had made a serious crime by Section 501. Attorney General Brownell in a statement dated April 20, 1954 in Hearings before Subcommittee 5 of the House Judiciary Committee on March 23, 1955 made it clear that the authority he sought to wiretrap would be confined to instances involving only our National Security, (p. 33) yet he recognized that, "The problem touches each of us." (p. 29)

Petitioner respectfully submits that there should not be a maximum standard of protection for one engaged in a criminal activity, including one who would destroy us, and none for himself. Under the full impact of the decision of the Court below, it would seem inevitable that this grave question herein will soon reach this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13256

JOSEPH F. FINNEGAN, Director, Federal Mediation and Conciliation Service, L. E. EADY, Director of Administrative Management, Federal Mediation and Conciliation Service, PHILIP YOUNG, Chairman, United States Civil Service Commission, et al., APPELLANTS

v.

JOHN T. DALY, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided June 27, 1957

Mr. Samuel D. Slade, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for appellants. *Mr. Leo A. Rover*, United States Attorney at the time the brief was filed, and *Mr. Lewis Carroll*, Assistant United States Attorney, also entered appearances for appellants.

Mr. Rees B. Gillespie for appellee.

Before PRETTYMAN, FAHY and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge*: Appellee Daly was a Commissioner in the Federal Mediation and Conciliation Service. He was a veterans' preference eligible. He was served with a letter of charges, which consisted of allega-

tions of dereliction of duty, intemperance, and disregard of instructions. He responded and thereafter was given notice of an intended discharge. He appealed to the Civil Service Commission, which after hearing affirmed. He then brought the present civil action for declaratory judgment and mandatory reinstatement. The District Court held that certain evidence received by the Commission was inadmissible, and therefore it remanded the case for reconsideration without the disputed evidence. The defendants, Government officials, appealed.

The first point on the appeal concerns the admissibility of disputed evidence. Daly had been stationed in Philadelphia. A matter concerning Food Fair-A & P Stores was pending. The first of the charges against Daly was dereliction of duty and failure to service that case. It appears he was supposed to be working on the case on a certain day (April 3, 1952), and the first part of the charge was that he could not be found. One of the subparagraphs of that charge was:

> "c. At 3:15 P. M. that day, you telephoned your Regional Director by telephone that you were meeting with representative Mullin of the A & P Stores."

In his later denial Daly said:

> "I deny that at 3:15 p. m. on that day I telephoned the Regional Director and informed him I was meeting with Representative Mullen of the A & P Stores."

There had been a telephone call from Daly to the Regional Director at 1:30 p. m. When Daly called again at 3:15 p. m. the Director, one Holbrook, signaled his secretary to take notes on the conversation. She picked up the receiver and took notes, which she recorded in a memorandum "For the Record". The original of the memorandum was placed in the Regional Confidential File. When the case was appealed to the Civil Service Commission, that tribunal had before it several affidavits,

including one from Holbrook and one from his secretary, and also had the memorandum "For the Record". The District Court held that the secretary's memorandum was illegally admitted to the record at the Commission, its use being in violation of Section 605 of the Communications Act.[1] But we do not reach that question.

The second point on this appeal is that, even though appellants be not sustained on their first point and subparagraph (c) of Charge 1 was erroneously sustained by the Commission, there remained in the charges and proof sufficient to sustain the ultimate action of the authorities in dismissing Daly. We agree. There were three charges, with four specifications in Charge 1 and two in Charge 3. The first charge was dereliction of duty, failure to service an assigned case, and giving false information, all alleged to have occurred in Philadelphia. Specification (a) related to the morning of April 3, 1952; (b) related to a phone call made at 1:30 p. m. that day; (c) related to the disputed call at 3:15 p. m.; and (d) related to a call at 5:30 p. m. Charge 2 related to a habit of intemperance and referred to occurrences in New York City after Daly had been transferred there from Philadelphia. Charge 3, with its two specifications, related to occurrences in New York. Thus it is apparent that the disputed evidence as to the telephone call at 3:15 p. m. on April 3, 1952, bore upon only one of the four specifications in one of the three charges.

The Chief Law Officer of the Civil Service Commission, after describing all the charges, concluded: "On the weight of all the evidence as to the merits of the case, it is concluded that the charges are sustained; * * *." That decision was affirmed by the Board of Appeals and Review and by the Commissioners.

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[1] 48 STAT. 1103 (1934), 47 U.S.C.A. § 605.

Charges 2 and 3, if sustained, were sufficient to support the dismissal. They were not affected by the disputed evidence, and so we do not reach the question whether that evidence was or was not properly considered. It is established that the invalidity of one charge will not vitiate a dismissal where the remaining charges are valid and sufficient.[2]

The judgment of the District Court is reversed, and the case will be remanded with instructions to the District Court to grant the defendants' motion for summary judgment.

We have before us a motion by Daly to dismiss the appeal. He says the order of the District Court was interlocutory and not appealable. But that order completely and finally disposed of the case in the District Court, and we do not see how the Government could obtain a review of the order except by an appeal from it at this time. We think the order was appealable.

Reversed and remanded.

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[2] *Baughman* v. *Green*, 97 U.S. App. D.C. 150, 229 F.2d 33 (D.C.Cir. 1956); *Williams* v. *Cravens*, 93 U.S. App. D.C. 380 210 F.2d 874 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 819, 99 L.Ed 646, 75 S.Ct. 30 (1954); *Devine* v. *Campbell*, 90 U.S. App. D.C 171, 194 F.2d 876 (D.C.Cir. 1952), *cert. denied*, 344 U.S. 826, 9 L.Ed. 643, 73 S.Ct. 27 (1952).

APPENDIX B

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Constitutional Provision

The Fifth Amendment to the Constitution provides in part as follows:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law;"

2. Statutes

The Communication Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. § 605 provides in part as follows:

> "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, pruport, effect, or meaning of such intercepted communication to any person;"

Section 14 of the Veterans Preference Act of Ju[illegible] 27, 1944 as amended, 63 Stat. 1067, 5 U. S. C. 863 provides in part as follows:

> "No permanent * * * preference eligible * * * shall be discharged * * * reduced in rank or compensation * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge * * * or reduction in rank or compensation is sought shall have at least thirty days' advance written notice, * * * stating any and all reasons, specifically and in detail, for any proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing * * * and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, * * * *Provided*, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, * * * after investigation and consideration of the evidence submit-

ted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, • • •